8-13-2008

EVCO Sound & Electronics v. Seaboard Sur. Co. Appellant's Brief Dckt. 34898

IN THE SUPREME COURT OF THE STATE OF IDAHO

EVCO SOUND & ELECTRONICS, INC.,

Plaintiff-Respondent,

v.

CEDAR STREET ELECTRIC AND CONTROL, INC., SEABOARD SURETY COMPANY,

Defendants-Appellant.

Supreme Court No. 34898

APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County
Honorable John T. Mitchell Presiding

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I. STATEMENT OF THE CASE

A. Summary of Argument

In this action, EVCO Sound and Electronics, Inc. ("EVCO") seeks payment against Seaboard Surety Company's ("Seaboard") payment bond issued pursuant to Idaho Code § 54-1927 and for breach of contract against Cedar Street Electric and Control, Inc. ("Cedar Street"). The matter proceeded to trial before the Honorable John T. Mitchell in August, 2007. The court issued its Findings of Fact and Conclusions of Law and Order on November 19, 2007, entering judgment in favor of EVCO and against Seaboard finding that EVCO and Cedar Street had entered into an express contract by virtue of their conduct and that EVCO's claims and suit were timely filed. Seaboard is appealing from this judgment.

To prevail on its claim against Seaboard, EVCO must prove (1) it had a contract to supply labor and materials to Cedar Street and that as a lower tier subcontractor, (2) it provided proper notice to the general contractor within 90 days of EVCO's last labor and materials, and (3) it filed suit within one year of the date it last supplied labor and materials.

Seaboard's appeal relates to both the contract formation issues between EVCO and Cedar Street, as well as the notice and limitations issues. Regarding the contract formation issues, Seaboard submits that the district court erred as a matter of law and disregarded well established Idaho law concerning contract formation in holding that EVCO and Cedar Street created an express contract **by their conduct**. Prior to trial, the district court in its Order Denying Summary Judgment,

determined there was **no express crontact** established between EVCO and Cedar Street. The district court stated:

> In turn, Cedar Street ***entered into negotiations*** with plaintiff Evco Sound & Electronics, Inc., to perform portions of the "low voltage" electrical work on the project. Evco proposed to supply labor and materials to Cedar Street for the fire alarm, intercom, telephone and television media section of the project.
> Although Evco and Cedar Street discussed the scope of the work and looked to enter into a written subcontract, ***the parties never entered into a formal express contract.***

(R., p. 239-40) (emphasis added). The district court went on to hold that questions of fact existed regarding whether the parties reached an oral contract. (R., p. 245-48).

After trial, in its Findings of Fact and Conclusions of Law, however, the district court found that although the parties intended to formalize any subcontract agreement with a formal written subcontract, an ***express contract*** was created by the ***conduct of the parties,*** notwithstanding the parties' failure to execute the intended written contract. The district court stated:

> Kevin Bauer of EVCO and Mike Coulter and Jim Kuzmich of Cedar Street, all testified they intended to reduce their agreement to a signed written subcontract or a written purchase order, or a joint check agreement. All three were created, but none of the three were signed by both parties. Regardless, this Court finds the ***conduct of the parties shows a meeting of the minds occurred and a contract was formed*** in the amount of $132,688.04, less the Idaho Use Tax amount of $3,258.04, for a total contract price of $129,430.00.

(R., p. 262) (bold italic emphasis added).

Seaboard respectfully submits the district court applied an implied in fact contract analysis to establish an express contract, and thereby ignored long-standing Idaho contract law. The district court's decision runs directly contrary to this Court's decision in *Mitchell v. Siqueiros*, 99 Idaho 396, 582 P.2d 1074 (1978), *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho

233, 31 P.3d 921 (2001), and *C.H. Leavell v. Grafe & Assoc., Inc.*, 90 Idaho 502, 414 P.2d 873 (1966), and amounts to an error of law. The district court disregarded the evidence in order to conclude an express contract arose between EVCO and Cedar Street.

With respect to the notice and timeliness of EVCO's claims and action, Seaboard respectfully submits that the alleged "work" on which EVCO predicates its claimed timeliness is insufficient under Idaho Code § 54-1927. EVCO claims it performed its last work in April of 2005 (training school district personnel and fine-tuning the TV system), and in June of 2005 (sending as-built drawings). Seaboard respectfully submits these actions are insufficient to qualify as "work" under Idaho Code § 54-1927, thereby extending the dates to provide notice and file suit. This is particularly true based upon all parties' agreement, as well as documentary evidence, that the Timberlake Junior High School Project (the "Project") was substantially completed in January of 2005. The Lakeland School District No. 272 ("School District") began operating the Project as a school on January 28, 2005.

Finally, regarding EVCO's claimed damages, this issue is directly related to the determination as to whether an express contract was formed between EVCO and Cedar Street. As set forth in EVCO's Exhibit 22, EVCO admits that it can only account for $51,108.63 worth of labor and materials, freight and taxes EVCO supplied to the Project. This is true, notwithstanding the breakout of labor and materials far exceeding these amounts by EVCO's prior bid proposals designated as Exhibits 8 and 18. EVCO was paid an amount exceeding its costs as listed in Exhibit

22, however, EVCO seeks to recover its expectation damages of $79,3363.04 against a third party – Seaboard.

B. Factual Background

1. Parties / Interested Companies

EVCO is a Washington corporation, principally located in Spokane, Washington. EVCO conducts business as a low-voltage electrical supply and installation company. (Tr. Vol. I, p. 5, l. 6-25).[1] EVCO business is comprised of 80% public works projects, 60% of which are school projects such as the project at issue in this matter. In the year in question, 2005, EVCO's gross revenue was approximately 6.4 million dollars. (Tr. Vol. II, p. 102, l. 4-17).

Seaboard is a surety licensed to provide surety bonds in Idaho. (R., p. 2, 11, and 39).

Cedar Street is an Idaho corporation, principally located in Sandpoint, Idaho. Cedar Street was an electrical contractor, licensed with the State of Idaho and maintained Idaho public works license No. 11613-A-4. (R., p. 2; Ex. 9; Tr. Vol. II, p. 61, l. 11-16)). Cedar Street was the electrical subcontract on the project in question. (Tr. Vol. II, p. 38, l. 6-24).

Although not a party to the action, Ormond Builders, Inc. ("Ormond Builders") was the principal on the bond issued by Seaboard as Bond No. SS7377 (the "Bond"). (Ex. 1). Ormond Builders was the general contractor on the project at issue. (Tr. Vol. II, p. 195, l. 25 - p. 197, l. 9).

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[1] The transcript is divided into two volumes as follows: Volume I – August 27, 2007 (direct examination of Kevin Bauer only); and Volume II – August 27, 2007 (remainder of trial).

2. The Project

The School District was the owner of the Project. Ormond Builders and Seaboard issued payment and performance bonds pursuant to Idaho Code § 54-1927. (Ex. 1). Ormond Builders subcontracted the entire electrical portion of the Project to Cedar Street in April of 2004, pursuant to a written Subcontract Agreement (Ex. M), which incorporated by reference the Project prime contract documents with the School District, which included the Prime Contract General and Supplementary Conditions. (Ex. M, p. 1).

3. Negotiations Between EVCO and Cedar Street

In or about March of 2004, EVCO prepared a bid form for portions of the electrical work on the Project, which was characterized by the parties as including "low voltage" electrical work for the amount of $165,850.00. (Ex. 4). Approximately one week after Exhibit 4 was prepared, and pursuant to discussions between EVCO and Cedar Street, EVCO revised its pricing on Plaintiff's Exhibit 4 to include Idaho sales or use tax at 6%. (Ex. 8). EVCO's revised bid identified a price of $170,161.00. (Ex. 8).

From March through the end of June 2004, EVCO made several revisions and changes to its bids. (Exhibit 12 and 18). There was testimony from EVCO, Cedar Street and Ormond Builders that during this time period there was an effort to "value engineer" portions of the work to reduce the amount of work and save money for the owner because the Project was over budget. (Tr. Vol. II, p. 21, l. 11 - p. 22, l. 6; p. 39, l. 6-20; p. 145, l. 13 - p. 146, l. 11). In June of 2004, Cedar Street and EVCO exchanged a number of facsimiles discussing the potential scope of an agreement

between EVCO and Cedar Street and the price to be paid for such work. (Ex. 14, 15, and F). Cedar Street wanted EVCO to be bound by the same agreement it had with Ormond Builders and used its subcontract with Ormond Builders to draft a subcontract for EVCO. Cedar Street went to the extraordinary step of scanning and changing its subcontract with Ormond Builders to prepare a written subcontract for EVCO should it reach an agreement with EVCO. (Tr. Vol. II, p. 43, l. 17 - p. 44, l. 25). From the documents exchanged between Cedar Street and EVCO, however, the parties never reached an agreement as to the scope of work which EVCO might perform on the Project or the amount EVCO would be paid by Cedar Street. (Ex. 15 and Ex. F).

Both James Kuzmich and Mike Coulter of Cedar Street testified that Cedar Street sought to self-perform more of the low-voltage work in order to reduce the amount of any potential subcontract with EVCO. (Tr. Vol. II, p. 46, l. 7-13; p. 77, l. 10 - p. 78, l. 6). Moreover, both Mr. Kuzmich and Mr. Coulter testified that Cedar Street never reached an agreement with EVCO regarding the scope of work the parties would perform or the price to be paid for the Project. (Tr. Vol. II, p. 45, l. 4 - p. 46, l. 2; p. 55, l. 5 - p. 56, l. 1; p. 76, l. 6 - p. 78, l. 25).

4. The Parties' Testimony Regarding the Intention to Execute a Written Subcontract or Written Purchase Order

Both EVCO (Kevin Bauer) and Cedar Street (Mike Coulter and Jim Kuzmich) testified regarding their respective intentions to reduce any agreement to a signed ***written*** subcontract or written purchase order.[2] (Tr. Vol. II, p. 20, l. 15 - p. 21, l. 2; p. 45, l. 20 - p. 46, l. 3; p. 63, l. 17 - p.

[2] Mr. Bauer's testimony is confusing at best regarding receipt of Cedar Street's proposed subcontract, and bears review by the Court. (*See* also Bauer deposition p. 25, l. 10 - p. 26, l. 9). Ultimately, however, he conceded he too anticipated a written contract. (Tr. Vol. II, p. 20, l. 15 -

65, l. 16). Mike Coulter testified that he understood that *if* an agreement were reached between EVCO and Cedar Street, such agreement would be reduced to a written subcontract or written purchase order executed between the two companies. (Tr. Vol. II, p. 45, l. 20 - p. 46, l. 3).

On June 14, 2004, Cedar Street's project manager, Mr. Coulter sent a facsimile (Ex. 14) to EVCO indicating that Cedar Street "intended" to enter into a contract with EVCO and that a proposed subcontract would be sent. Mr. Coulter also requested that EVCO supply "back cans" to the Project. (Ex. 14). On June 22, 2004, Mr. Coulter sent a facsimile to EVCO (Ex. 15 and Ex. F), attaching a proposed subcontract, requesting EVCO's review of the same. Mr. Coulter testified that he left blank the scope of work and price in the subcontract because the parties had not reached an agreement. (Tr. Vol. II, p. 45, l. 4-9). Mr. Coulter testified that there was never an agreement between Cedar Street and EVCO as to the scope of work EVCO would perform or the price it would be paid. (Tr. Vol. II, p. 55, l. 5 - p. 56, l. 1).

Mr. Kuzmich, the owner of Cedar Street, also testified that it was always his intention to enter into a written subcontract with EVCO, *if* the parties could reach an agreement as to the scope of work EVCO would perform and the price it would be paid on the Project. (Tr. Vol. II, p. 78, l. 22-25). Mr. Kuzmich testified that it was standard practice for Cedar Street to use signed agreements on subcontracts of the magnitude of the proposal from EVCO. Mr. Kuzmich testified that Cedar Street had previously used form subcontracts from other general contractors, to subcontract work and bind lower tier subcontractors to Cedar Street. (Tr. Vol. II, p. 63, l. 17 - p. 65, l. 19).

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p. 21, l. 2).

After rather extensive cross examination on the issue, Mr. Bauer also agreed that as the owner of EVCO, he anticipated that EVCO and Cedar Street would execute a written subcontract or written purchase order ***if*** the parties could reach an agreement regarding the scope of work to be performed by the parties and the price to be paid to EVCO. (Tr. Vol. II, p. 20, l. 15 - p. 21, l. 2).

Additionally, the Project Specifications at general condition 5.3.1 require Ormond Builders to use contracts to subcontract work, where required by Idaho law to be valid and binding. (Ex. N, p. 23). The subcontract between Ormond Builders and Cedar Street incorporated the general conditions into that subcontract, such that Cedar Street was bound to only subcontract work pursuant to a written agreement. (Ex. M). Mr. Bauer admitted that no one on behalf of Cedar Street or Ormond Builders ever signed any document agreeing to any of EVCO's bids, Exhibits 4, 8, 12, or 18. (Tr. Vol. II, p. 10, l. 4-10).

5. The Joint Check Agreement

On or about June 23, 2004, Cedar Street sent an unsigned joint check agreement to EVCO. (Ex. 16). The proposed joint check agreement listed an incorrect corporate name for EVCO, and listed a proposed amount for materials, which differed from any of the amounts previously discussed between EVCO and Cedar Street. The proposed joint check agreement lists EVCO as only a material supplier (not a subcontractor) in three different places. (Ex. 16). Mr. Bauer signed the joint check agreement on behalf of EVCO. (Ex. 16). No one from Cedar Street ever signed the proposed joint check agreement, nor did Ormond Builders ever sign the proposed joint check agreement. (Tr. Vol. II, p. 65, l. 22-25; p. 127, l. 17 - p. 132, l. 5; Ex. 16).

Mr. Hostert of Ormond Builders testified that Mr. Kuzmich of Cedar Street advised him that Cedar Street was declining to execute the proposed joint check agreement, because it was "no longer necessary" and Cedar Street anticipated performing more of the low-voltage electrical work, rather than subcontracting with EVCO to perform that work. (Tr. Vol. II, p. 129, l. 17 - p. 132, l. 5).

On behalf of Ormond Builders, Mr. Ormond testified concerning the difference between a "notice of intent" to contract and a "notice to proceed". Mr. Ormond testified that in the construction industry, a notice of intent to contract is used when parties have not yet reached an agreement as to the price, scope of work or terms of a contract. It is used to identify the potential that parties may contract, but does not create the contract between them. Mr. Ormond testified that "notice to proceed" is used in the construction industry once a contract is reached by the parties and "notice to proceed" directs that work commence under the terms of the contract. (Tr. Vol. II, p. 191, l. 7 - p. 193, l. 20).

6. Materials and Labor Supplied By EVCO to the Project

Despite the lack of an executed written subcontract or purchase order between Cedar Street and EVCO, EVCO did provide materials and minimal labor to the Project, which is detailed and listed in Exhibit 22. (Ex. 22). Pursuant to Exhibit 22, EVCO provided $45,393.16 in materials to the Project. Mr. Bauer was unable to identify any materials supplied to the Project, which were not included in the materials listed in Exhibit 22. (Tr. Vol. II, p. 25, l. 24 - p. 26, l. 2).

EVCO tracked its field labor on the Project, and listed its technician for field labor in Exhibit 22 in the amount of $4,454.27. Although EVCO purports to have incurred additional "labor" costs

in the amount of its claim ($79,343.03) it did not and pursuant to Mr. Bauer's testimony EVCO can not track such labor to substantiate its claimed damages. Mr. Bauer could not testify with any degree of specificity as to labor supplied to the Project, other than as detailed in Exhibit 22. (Tr. Vol. II, p. 27, l. 11-24). Thus, the only valid evidence before the court as to EVCO's expenses was that contained in Exhibit 22.

Mr. Bauer also testified that EVCO sent its billings directly to Cedar Street. EVCO's last billing invoice is Invoice No. 6710 in the amount of $8,350.00. That billing invoice as submitted in EVCO's claim to Seaboard was dated February 11, 2005, as identified in Exhibit 2, attachment b, bates label 298. However, the same billing invoice number and amount appears to have been changed in Exhibit 20, to reflect a later billing date of March 22, 2005. Incidentally, the first copy of this billing invoice, dated February 11, 2005, bears a facsimile legend at the top which predates the copy of the invoice provided in Exhibit 20, dated March 22, 2005. Mr. Bauer testified that EVCO bills for work only after it has been completed, in the form of a progress billing identifying the percentage completed as of the date of the invoice. (Tr. Vol. II, p. 24, l. 3 - p. 25, l. 1).

Further, as to the issue of mark-ups, although Mr. Bauer testified on direct examination in EVCO's case in chief regarding mark-up rates it expects to earn on work such as the Project, Mr. Bauer later admitted Cedar Street never agreed to any mark-up rate or amount. He also admitted no one at Ormond Builders agreed to a mark-up rate or amount. Finally, he admitted that he did not and does not discuss EVCO's mark-up amount or rates with contractors. There was no evidence

presented of any agreement between EVCO and Cedar Street regarding the amount of a "mark-up" for EVCO. (Tr. Vol. II, p. 117, l. 22 - p. 118, l. 8).

7. EVCO's Request for Additional Payment

At or near the date of substantial completion of the Project, Mr. Bauer contacted Mr. Hostert to inform him that Cedar Street owed payment to EVCO on the Project. Mr. Hostert testified that he requested that Mr. Bauer forward a copy of the subcontract between EVCO and Cedar Street to substantiate EVCO's claims. (Tr. Vol. II, p. 134, l. 4 - p. 135, l. 5). Mr. Hostert testified he never received a response from Mr. Bauer regarding the subcontract, however, some time in March of 2005, Mr. Bauer again contacted Mr. Hostert to request payment. Thereafter, Mr. Bauer forwarded a copy of Exhibit 18 to Mr. Hostert, which Mr. Hostert understood to be a bid proposal. (Tr. Vol. II, p. 135, l. 6 - p. 136, l. 11).

Both Mr. Ormond and Mr. Hostert testified regarding the payments made to EVCO. Mr. Hostert testified Ormond Builders observed work performed and materials supplied by EVCO to the Project, and based upon past project experience, determined that a payment of $50,000.00, combined with the previous payment of $3,325.00 would cover the amount of labor and materials supplied by EVCO. (Tr. Vol. II, p. 137, l. 21 - p. 140, p. 19; p. 205, l. 1 - p. 207, l. 1). Pursuant to Exhibit 24 and the testimony of Mr. Bauer, Mr. Hostert and Mr. Ormond, EVCO was paid $53,325.00 on the Project. This amount exceeds EVCO's tracked labor and material costs on the Project as detailed in Exhibit 22, by $2,216.37. (Ex. 22).

8. Completion of the Project

The School District took beneficial occupancy of the Project on January 28, 2005, and utilized the Project for its intended purpose as a school from that date forward. Mr. Hostert, Ormond Builders' project manager, testified that subsequent to January 28, 2005, the only Project work performed by Ormond Builders or its subcontractors was either punchlist and warranty work or original contract work such as landscaping that could not be performed until weather permitted. Both the architect, Mr. Fischer, and Mr. Hostert testified that owners such as the School District typically withhold payment from a general contractor, until all punchlist and warranty work is completed. (Tr. Vol. II, p. 174, l. 5-21; p. 227, l. 11-25; p. 232, l. 5-10). Mr. Fischer testified that as of the date of substantial completion, all of the low-voltage systems within the building on the Project were completed and operational. (Tr. Vol. II, p. 231, l. 9-24; Ex. Q; Ex. 25). Mr. Fisher certified each of the systems on which EVCO provided material or labor as 100% complete pursuant to Ormond Builders' February 17, 2005, pay request. (Ex. Q, 25).

9. EVCO's Bond Claim

On June 13, 2005, Ormond Builders received a Notice of Claim by EVCO through its counsel asserting that it was entitled to $79,343.03 pursuant to Idaho Code § 54-1927. EVCO's Notice was dated June 8, 2005. (Ex. 2). Thereafter, on September 29, 2005, EVCO provided Notice to Seaboard of its claim, attaching its prior notice to Ormond Builders. (Ex. 2). EVCO claims that training it provided on April 15, 2005, makes its claim on the bond timely under the Idaho Public Contract Bond Act. EVCO also asserted that it submitted "as-built drawings" in June of 2005, which

also made its bond claim timely, however, there was no documentary evidence at trial regarding EVCO's submission of any as-built drawings. (Tr. Vol. I, p. 45, l. 9-15).

C. Procedural History

EVCO filed its Complaint against Cedar Street and Seaboard on March 10, 2006. (R., p. 2-5). EVCO exclusively pled in its Complaint that it had a ***written contract*** with Cedar Street. (R., p. 3). There were no allegations of an implied or express contract. Seaboard filed its Answer on May 4, 2006. (R., p. 10-14). Cedar Street never answered the Complaint. After being found in default, Cedar Street's Motion to Set Aside Default was denied. (R., p. 274).

Seaboard filed a Motion for Summary Judgment on March 16, 2007, which it argued that EVCO's claims were barred by the statute of limitations and that there was no expressed contract right of recovery. Seaboard asserted its arguments based on the very same evidence submitted at trial. (R., p. 36-61). In its summary judgment ruling, the district court correctly found that there was no "formal express contract," which was contrary to EVCO's verified Complaint. (R., p. 239-40, 245). The district court specifically stated: "Undisputed facts reveal there was never an express contract between EVCO and Cedar Street".[3] The district court also ruled that genuine issues of material fact existed regarding the statute of limitations and notice and whether Cedar Street and EVCO reached an oral agreement. However, after a two-day trial, and an examination of exactly the same documentary evidence, the district court ruled that the parties had an express contract based upon the conduct of the parties, notwithstanding the stated intention of both parties to execute a

[3] The district court repeatedly used the term "formal express contract" presumably to mean a written contract.

written agreement. The district court also deemed EVCO's notice and action against the bond to be timely, and concluded that its alleged oral express agreement was not barred by the statute of frauds. (R., p. 236-52).

II. ISSUES PRESENTED ON APPEAL

The following issues are presented for review on appeal:

(1) Whether the district court erred by as a matter of law in holding that an express contract was established between EVCO and Cedar Street.

(2) Whether the district court erred as a matter of law in awarding EVCO's alleged expectation damages against Seaboard's bond.

(3) Whether the district court erred in determining EVCO's Notice and Claim were timely, pursuant to Idaho Code § 54-1927.

(4) Whether the district court erred in determining that EVCO's claims were not barred as against Seaboard based upon the statute of frauds.

III. ATTORNEYS' FEES ON APPEAL

Idaho Code § 54-1929 authorizes a prevailing party attorneys fee award at the trial court level. However, Idaho appellate courts have held attorneys fees are not properly awarded under I.C. § 54-1929 on appeal. *See LeGrand Steel Prods., Co. v. A.S.C. Constructors, Inc.*, 108 Idaho 817, 819, 702 P.2d 855, 857 (Ct. App. 1985); (fees on appeal denied to prevailing subcontractor); *EIMCO Div. of Envirotech Corp. v. United Pac. Ins. Co.*, 109 Idaho 762, 765, 710 P.2d 672, 675 (Ct. App. 1985) (fees on appeal denied to prevailing surety). Attorneys fees on appeal in this matter would be

governed by Idaho Code § 12-121. *See Oldcastle Precast v. ParkTowne Const., Inc.*, 142 Idaho 376, 379, 128 P.3d 913 (2005) (implicitly finding prevailing party fees on a bond claim action only available under Idaho Code § 12-121 – fees denied to prevailing surety under Idaho Code § 54-1929).

IV. ARGUMENT

A. The District Court Erred as a Matter of Law in Holding that its Findings of Fact Demonstrated an Express Contract Between EVCO and Cedar Street.

"[T]he court cannot make a contract for the parties." *Brothers v. Arave*, 67 Idaho 171, 175, 174 P.2d 202, 205 (1946). The district court, ignoring long-standing principles of contract law, found an express contract, where there is no evidence of acceptance by Cedar Street of the price or scope of work proposed by EVCO. In fact, Cedar Street notified EVCO that it expected the parties to enter into a written contract and provided a proposed subcontract, the terms of which differed from EVCO's proposals. In its decision, the district court misapplied the legal requirements of contract formation and confused concepts of implied contracts and express contracts. The general contractor and owner insisted on written subcontracts on the Project, including any agreement between EVCO and Cedar Street, to protect themselves from the very type of claim asserted by EVCO. To allow EVCO to obtain benefits of any of its unaccepted proposed bids as against Seaboard would be fundamentally unfair. EVCO's documentation of its work does not support its claimed expectation damages. Moreover, EVCO could have insisted on a written contract or tracked its purported labor and materials to support its alleged damage claim. Instead, it seeks to impose its alleged expectation damages on an innocent third-party, Seaboard.

The district court's application of contract law to the facts of this case is a conclusion of law over which the Supreme Court exercises free review. *See Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 831, 103 P.3d 440, 444 (2004).

1. No Express Contract was Formed Because the Parties Proposed Different Terms and No Acceptance of Either Party's Proposals Occurred.

The conflicting terms proposed by the parties' prohibited a meeting of the minds and the creation of an express agreement. Three types of contractual arrangements are recognized under Idaho law:

> First is the ***express contract*** wherein the parties expressly agree regarding a transaction. Secondly, there is the ***implied in fact contract*** wherein there is no express agreement but the ***conduct of the parties*** implies an agreement from which an obligation in contract exists. The third category is called an ***implied in law contract, or quasi contract.*** However, a contract implied in law is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent or the agreement of the parties and, in some cases, in spite of an agreement between the parties. It is a non-contractual obligation that is to be treated procedurally *as if* it were a contract, and is often referred to as quasi contract, unjust enrichment, implied in law contract or restitution.

Great Plains Equip., Inc. v. Northwest Pipeline Corp., 132 Idaho 754, 767, 979 P.2d 627, 640 (1999) (citing *Continental Forest Prods., Inc. v. Chandler Supply Co.*, 95 Idaho 739, 518 P.2d 1201 (1974) (emphasis added)). Moreover, the Supreme Court has identified the requirements for acceptance of an express contract stating: "An enforceable contract requires 'distinct understanding common to both parties.' Acceptance of an offer must be unequivocal and identical to the offer made. 'The minds of the parties must meet as to all the terms before a contract is formed.' Proof of a meeting of the minds requires evidence of mutual understanding as to the terms of the agreement and the

assent of both parties." *Potts Const. Co. v. North Kootenai Water Dist.*, 141 Idaho 678, 681, 116 P.3d 8, 11 (2005) (internal citations omitted). This Court has frequently detailed the requirements of mutual assent necessary to support contract formation:

> The minds of the parties must meet as to all of its terms, and, if any portion of the proposed terms is unsettled and unprovided for, there is no contract. An offer to enter into a contractual relation must be so complete that upon acceptance an agreement is formed which contains all of the terms necessary to determine whether the contract has been performed or not. An acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offerer in order to constitute a binding contract.

C.H. Leavell v. Grafe & Assoc., Inc., 90 Idaho 502, 511, 414 P.2d 873, 877 (1966) (internal citations omitted). Contrary to the legal conclusions of the court, the evidence failed to support a meeting of the minds which is a necessary prerequisite to finding an express contract.

Further, the district court confused elements of an implied in fact contract with an express contract. In *Fox v. Mountain West Electric, Inc.*, 137 Idaho 703, 59 P.3d 878 (2002), the Idaho Supreme Court discussed the elements of implied in fact contracts, and stated:

> "An implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance." *Farnworth v. Femling,* 125 Idaho 283, 287, 869 P.2d 1378, 1382 (1994) (citing *Clements v. Jungert,* 90 Idaho 143, 153, 408 P.2d 810, 815 (1965)). The implied-in-fact contract is grounded in the parties' agreement and tacit understanding. *Kennedy v. Forest,* 129 Idaho 584, 587, 930 P.2d 1026, 1029 (1997). "The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact." *Homes by Bell-Hi, Inc. v. Wood,* 110 Idaho 319, 321, 715 Pl2d 989, 991 (1986) (citing *Clements v. Jungert,*

90 Idaho 143, 153, 408 P.2d 810, 815 (1965); *Bastian v. Gafford,* 98 Idaho 324, 325, 563 P.2d 48, 49 (1977)).

Mountain West Electric, Inc., 52 P.3d at 853. Consequently, the conduct of the parties may have demonstrated an implied contract, but not an express contract.

No meeting of the minds to support an express contract occurred in this case because the parties' proposals and counter proposals were never in agreement, no common understanding was ever reached. The district court's error in holding an express contract existed is best illustrated by reviewing the undisputed chronology of the parties' offers and counteroffers, facts and documents:

Date	Party	Item	Proposal
March 3, 2004 (Ex. 1)	EVCO	EVCO bid proposal	$165,850.00 No details regarding the scope of work
March 10, 2004 (Ex. 8)	EVCO	EVCO revised bid	$147,500 + $18,350 + taxes Details regarding the scope of work
March 15, 2004 (Ex. E; Ex. 12)	EVCO	EVCO second revised bid proposal	$34,930.00 purportedly deducted from prior bid No price or scope of work included
June 14, 2004 (Ex. 14)	Cedar Street	Cedar Street fax	"Please accept this fax as our **intent to enter into contract** with EVCO for this project **(Contract to follow)**. We need back cans for wall mount clock & speakers. ASAP"
June 22, 2004 (Ex. G)	Cedar Street	Cedar Street fax	"**[I]n order for us to be on the same page,** the following [engineering] items have been accepted. **Could you please provide me with your amount again. . . . Also, please review subcontract.**"
June 22, 2004 (Ex. F.)	Cedar Street	Draft subcontract	Contract is blank as to scope and amount, and proposes substantial new additional terms

June 23, 2004 (Ex. G)	Cedar Street	Proposed joint check agreement	Proposed amount not to exceed $130,000.00 for **materials**
June 28, 2004 (Ex. G)	EVCO	EVCO executed joint check agreement	Cedar Street does not execute joint check agreement with EVCO[4] Ormond Builders does not execute joint party check agreement
June 29, 2004 (Ex. B)	EVCO	EVCO third revised bid	Alternative bids at $165,850.00, $170,161.00, or $132,688.04

In addition to the above-listed offers and counter offers, Cedar Street witnesses also testified there was never an agreement with EVCO regarding the scope or price. (Tr. Vol. II, p. 55, l. 5 - p. 56, l. 1[5]; p. 76, l. 6 - p. 78, l. 25[6]). In fact, Cedar Street intended to

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[4] Cedar Street did execute at least two other joint party check agreements with other parties. (Tr. Vol. II, p. 127, l. 13 - p. 128, l. 4).

[5] Mr. Coulter:
Q. But as I understood your testimony on direct examination, as of the date of June 19th you didn't have an understanding or agreement as to the scope of work that it would do if you reached an agreement, correct?
A. That's correct.
Q. Or a price between EVCO and Cedar Street, correct?
A. That's correct. Final -- go ahead.
Q. No, excuse me.
A. I would've said that I wouldn't make the final decision anyway. That would've been up to Mr. Kuzmich.
Q. And that's the reason Exhibit F is blank as to the scope of work and the price, correct?
A. That's correct.

[6] Mr. Kuzmich:
Q. Mr. Kuzmich, could you turn your attention to Exhibit 14?
A. Yes, sir.
Q. And you might recall counsel directed your attention to the last sentence. It says, "We need back cans for wall mount clock and speakers ASAP." Do

you recall that?
A. I recall he asked me that, yes, sir.
Q. And counsel said, "And it means just what it says, right?" Do you recall that phrase?
A. Yes, sir.
Q. Do you understand this to be an agreement to the scope of work or price previously proposed by Evco for all of the work on the project?
A. Oh, no, sir.
Q. Do you ever remember reaching an agreement as to the scope of work proposed by Evco on the Timberlake project?
A. No, sir.
Q. How about the price?
A. No, sir.
Q. Turning your attention to Exhibit 18, do you see the amounts listed for material and equipment in the sections?
A. Yes, sir.
Q. Do you recall having any discussions or attempting to discuss with Evco a break-out, a further break-out of those numbers?
A. Yes, sir.
. . . .
Q. (By Mr. Hahn) Are you familiar with the low voltage work that is being proposed in Exhibit 18?
A. Yes, sir.
Q. And based on your experience, do you have a feeling as to whether the amounts are reasonable or unreasonable, high or low?
A. I felt they were a little high.
Q. Did you in your own mind think that perhaps Cedar Street could do some of this work?
A. I felt that our labor could do this cheaper than what was listed here.
Q. In fact, do you recall discussing that with people at Ormond Builders, that Cedar Street would perhaps undertake portions of this work?
A. I don't recall if I personally had that conversation.
Q. Did you have those same types of conversations or that type of conversation with Mr. Coulter?
A. Yes, I did.
Q. And tell me what you recall.
A. I spoke with Mike about, uh, getting some numbers broken out here to see where we might be able to save some dollars on this contract, either via us purchasing some of the material ourselves at a cheaper rate or having some of

self-perform some of the work initially proposed by EVCO because it believed EVCO's labor price was too high. (Tr. Vol. II, p. 46, l. 7-13; p. 77, l. 10 - p. 78, l. 6). Further, Cedar Street testified that it expected to enter into a written contract so that EVCO would be bound to the same terms as Cedar Street was bound to Ormond Builders. (Tr. Vol. II, p. 43, l. 17 - p. 44, l. 25; Ex. M). Even Mr. Bauer could not "recall" whether or not Cedar Street accepted any of EVCO's bid proposals, but claimed Exhibit 14, (the request for back cans), was a direction for EVCO to start work on the Project. (Tr. Vol. I, p. 24, l. 1-5). This does not amount to a meeting of the minds.

In considering the above-listed offers, counteroffers and changed terms, the district court created an express contract between Cedar Street and EVCO when the closest the parties ever came to an express agreement was a future "intent" to enter into a contract ***if*** the parties could agree on the scope of work and price. "Proof of a meeting of the minds requires evidence of mutual understanding as to the terms of the agreement and the assent of both parties." *Potts Const. Co. v. North Kootenai Water Dist.*, 141 Idaho 678, 681, 116 P.3d 8, 11 (2005). At best, the parties conduct established an implied in fact contract as to only a very small portion of the work. No express agreement ever arose. This is particularly true if Cedar Street's proposed subcontract terms are reviewed. (Ex.F). The district court erred as a matter of law in concluding the legal requirements

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> our apprentices do the work at a lesser rate. That's pretty much my involvement with it.
> Q. Mr. Kuzmich, was it always your intention, if you were to reach an agreement with Evco, to enter into a written purchase order or subcontract?
> A. Yes, it was.

for an express contract, a meeting of the minds (i.e., distinct understanding common to both parties) were met.

Although the district court recognized that the parties never entered into a "formal express contract," it created an express contract by incorporating the scope of work that was memorialized in Exhibit 8 on March 10, 2004, and a price memorialized in Exhibit 18 on June 29, 2004. The court, however, ignored any of the additional terms proposed by Cedar Street in what the court viewed as its acceptance if EVCO's terms in its response in Exhibit 14 on June 14, 2004. (R., p. 246). The district court's holding regarding Cedar Street's legally binding acceptance consisted of only the following:

> Please accept this fax as our **intent to enter into contract with EVCO for this project. (Contract to follow)**
> We need back cans for wall mount clock & speakers. ASAP

(R. p. 242; Ex. 14) (emphasis added). The district court ignored long-standing Idaho law concerning contract acceptance: "An acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offerer in order to constitute a binding contract." *C.H. Leavell v. Grafe & Assoc., Inc.*, 90 Idaho 502, 511, 414 P.2d 873, 877 (1966) (internal citations omitted).

Clearly, Cedar Street's purported acceptance did not mirror EVCO's proposed bid in Exhibit 8 or any of its other offers. Exhibit 14 neither expresses an agreement as to the price or to the scope of work, or unequivocal acceptance of any of EVCO's prior bids. Cedar Street attached its formal

subcontract that proposed numerous additional terms. The district court completely failed to acknowledge the additional terms in Cedar Street's subcontract. In fact, the district court's findings of fact and conclusions of law cite Exhibit F only once. (R., p. 240). Interestingly, Seaboard submitted the only copy of the subcontract because EVCO failed to include a complete copy of the facsimile, which is Exhibit 15. (R. p. 236-53).

The district court confused preliminary negotiations with an offer and proper acceptance. This Court previously explained the difference:

> [a] manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

Intermountain Forest Management v. Louisiana Pacific Corp., 136 Idaho 233, 237, 31 P.3d 921, 925 (2001) (quoting *Restatement (Second) Contracts* § 26). Cedar Street indicated it intended to contract with EVCO, but requested that EVCO enter into a written contract. (Ex. 14, F). Cedar Street later requested that EVCO review the subcontract. (Ex. 6). Cedar Street never accepted any of EVCO's proposals and EVCO never accepted Cedar Street's proposals. The parties engaged in nothing more than preliminary negotiations that failed to conclude with an express contract formation, except perhaps as to the purchase of "back cans." (Ex. 14).

The district court could only reach its decision by misapplying very limited case law where an express agreement was found even though the parties agreed to enter into a written agreement. *See Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 103 P.3d 440 (2004); *but see C.H. Leavell & Co. v. Grafe & Assoc.*, 90 Idaho 502, 512, 414 P.2d 873, 877 (1966). Although factually distinct,

the analysis of *Barry* is illustrative. In *Barry*, the contractor, Pac-West, advertised for bids on two specification sections of its general contract, Sections 09260 and 09511. *See Barry*, 140 Idaho at 830, 103 P.3d at 443. Quality, the subcontractor, submitted a bid for the work. *See id.* Pac-West contacted Quality and offered it the job "it had bid." *Id.* Pac-West claimed it believed an additional specification, Section 09111, was included in Quality's bid, and sent Quality a proposed subcontract with the additional section included. *See id.* There was, however, obvious agreement only as to the original specification sections. Quality signed the contract, but did not return it to Pac-West and refused to perform the work associated with the additional section. *See id.*

The trial court found that the parties were bound by the preliminary agreement, i.e., Pac-West's verbal acceptance of Quality's bid, as follows:

> A formal written contract was contemplated between the parties, but the fact that one was not executed is not fatal to the agreement. The district court held that Quality and Pac-West were bound by the preliminary agreement, relying on the principle articulated in *Miller Constr. Co. v. Stresstek*, that where 'the parties act under the preliminary agreement or receive benefits thereunder, they will be held to be bound notwithstanding the fact that a formal contract has never been executed. The preliminary agreement consisted of Quality's bid on Sections 09260 and 09511 and Pac-West's acceptance of that offer by offering Quality the job "it had bid." The parties acted pursuant to that agreement.

Id.

In this case, the district court found the parties "all testified they intended to reduce their agreement to a signed written subcontract or a written purchase order, or a joint check agreement. All three were created, but none of the three were signed by the parties." (R. p. 262, ¶ 17). This case is factually distinct from *Barry* in that here, unlike in *Barry,* there was never any initial agreement

as to the terms and conditions. What is required under *Barry*, for an express contract to be created, is a preliminary *agreement* pursuant to which the parties acted. Contrary to *Barry*, however, there is absolutely no evidence of a preliminary agreement here. No evidence shows that Cedar Street ever "accepted" EVCO's bid orally or in writing. In fact, Cedar Street indicated it ultimately refused to execute the joint party check agreement because it had not reached an agreement with EVCO as to the scope of the work and Cedar Street intended to self-perform a larger portion of the proposed work. Cedar Street informed the general contractor of the failure to reach an agreement with EVCO. (Tr. Vol. II, p. 128, l. 19 - p. 131, l. 21). Further, Cedar Street provided its own proposal and sent EVCO additional terms in its subcontract. Cedar Street's actions are legally insufficient for mutual assent and contract formation. Cedar Street's only commitment directed to EVCO was an intent to enter into a written contract in the future, i.e., preliminary negotiations and a request for EVCO to provide back cans which is legally insufficient to form an express contract. (Ex. 14). At best, EVCO and Cedar Street had an express agreement only for EVCO to provide the back cans for the Project. Moreover, if Cedar Street had accepted EVCO's offer by its words on June 14, 2008, in Exhibit 14, it makes no sense that it would leave both the price and scope of work blank in the proposed subcontract sent to EVCO on June 22, 2008, Exhibit F.

Further, Cedar Street's subcontract proposed substantially different terms, which the district court failed to acknowledge. Cedar Street expected EVCO to be bound by the same terms Cedar Street had with Ormond Builders. (Tr. Vol. II, p. 43, l. 17 - p. 44, l. 25; Ex. M). The district court dismissed the proposed subcontract as a "form contract" (R., p. 240), but Cedar Street provided

uncontested testimony that it rejected any form contracts it reviewed and specifically chose to copy Ormond Builders' contract as its contract with EVCO. (Tr. Vol. II, p. 43, l. 17 - p. 44, l. 25; Ex. F). Moreover, Cedar Street, in its proposed agreement provided to EVCO on June 22, 2004, proposed payment requirements; changes, additions, and deductions limitations; timeliness and delay damages; indemnity provisions, workers compensation requirements, bonding requirements, insurance coverages, etc. (Ex. F., p. 2-5). These additional terms were never accepted by EVCO and were essential elements to Cedar Street's willingness to contract with EVCO. *See C. H. Leavell & Co. v. Grafe & Assocs., Inc.,* 90 Idaho 502, 511, 414 P.2d 873, 876-77 (1966) (finding no meeting of the minds as to scope of work and requirement to furnish a performance bond). The district court ignored the terms of the proposed subcontract.

Adhering to the fundamental principles of contract formation is especially critical in this case because the Court is requiring an innocent third-party not privy to the full negotiations and discussions, Seaboard, to pay the costs of the alleged express contract. The district court has saddled Seaboard with EVCO's claimed, yet improved expectation damages. Clearly, the district court's determination opens the door for abuse and manipulation by subcontractors and suppliers.

The district court erred because the facts were legally insufficient to support mutual assent and a meeting of the minds. Cedar Street's notice of its intent to contract with EVCO by written agreement is not sufficient to form an express contract.

2. No Express Contract was Formed Because Cedar Street Intended a Written Contract to Finalize any Agreement.

The district court erred in holding a legally enforceable express agreement existed because Cedar Street consistently indicated its intent to finalize any agreement in an executed writing. "Whether a contract exists when contracting parties agree to reduce their agreement to writing, is question of the parties' intent . . . .Where it is clear that one party has agreed that an oral agreement must be reduced to writing before it shall be binding, there is no contract until a formal document is executed." *Miller Const. Co. v. Stresstek*, 108 Idaho 187, 188, 697 P.2d 1201, 1202 (Ct. App. 1985) (citing *Mitchell v. Siqueiros*, 99 Idaho 396, 400, 582 P.2d 1074, 1078 (1978)). "The parties' intent determines whether an oral contract was formed when the parties agree to reduce their agreement to a writing. An oral agreement is valid if the written draft is viewed by the parties as a mere record; the oral agreement is not valid if the parties view the written draft as a consummation of the negotiation." *Thompson v. Pike*, 122 Idaho 690, 697, 838 P.2d 293, 300 (1992). Several factors are considered if there is a question as to the parties' intent regarding a written contract, such as: "(1) whether the contract is one usually put in writing, (2) whether there are few or many details, (3) whether the amount involved is large or small, (4) whether it requires a formal writing for a full expression of the covenants and promises, and (5) whether the negotiations indicate that a written draft is contemplated as the final conclusion of negotiations." *Id.* EVCO bore the burden of proof at trial to show the contract was binding, in spite of the failure to consummate the written agreement. *See id.* Seaboard submits that EVCO failed to meet this burden.

This case is similar to the case of *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 31 P.3d 921 (2001) in which the Idaho Supreme Court held that no valid express contract existed based upon the parties' failure to both sign a proposed written subcontract agreement.[7] In *Intermountain,* the defendant Louisiana Pacific Corp ("L-P") had a written contract with SMF Resources to log a section of land. Prior to completion, SMF ceased working based upon financial difficulties and one of its employees, Gary Briggs, who also was the President of the plaintiff corporation ("IFM") offered to continue the contract work. L-P's forester, Laurie Stone, met with Briggs and ultimately provided him with a proposed written subcontract agreement for IFM to undertake the work. Briggs executed the proposed subcontract and gave it to Stone to be executed by L-P. Briggs also began performance by forwarding certificates of proof of insurance, and also purchased equipment to begin the work. IFM claimed to have performed some of the logging work.

Ultimately, no one at L-P ever signed the proposed subcontract, and L-P did not allow IFM to proceed with the work. IFM filed suit alleging breach of contract, and L-P filed a motion for summary judgment arguing that no express contract was ever established based upon a lack of mutual assent. IFM asserted that based upon L-P actions in forwarding a proposed subcontract, which was signed by IFM who commenced performance, an expressed contract was established.

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[7] This case is even less compelling than the plaintiff's claims in *Intermountain Forest Management.* There, the plaintiff produced evidence that at least one party had signed the proposed contract prior to commencing performance.

IFM argued that by forwarding the proposed written contract L-P had made an "offer" which was "accepted" upon signing by IFM. The Court disagreed. On cross motions for summary judgment, the court held that based upon the failure of both parties to execute the proposed subcontract, no express contract was formed. On appeal, the Idaho Supreme Court affirmed the summary judgment stating:

> It is uncontroverted that no representative of L-P ever executed the contract; therefore, even drawing all inferences in favor of IFM, there are no genuine issues of material fact in dispute regarding the lack of execution of a formal contract and the district judge did not err in granting L-P summary judgment on this issue.

Intermountain, 136 Idaho at 236.

After affirming the summary judgment in favor of L-P. the Supreme Court continued at length regarding IFM's theory of "offer" and "acceptance" as effectuating a contract. The Court stated:

> IFM further argues the mere absence of a signature did not prevent contract formation, citing *Smith v. Boise Kenworth Sales, Inc.,* 102 Idaho 63, 67, 625 P.2d 417, 418 (1981). However, even if the lack of a signature does not necessarily prevent contract formation, IFM still must show a contract was formed through mutual assent. *Thompson v. Pike,* 122 Idaho 690, 696, 838 P.2d 293, 299 (1992). ***A distinct understanding common to both parties is necessary in order for a contract to exist.*** *Mitchell v. Siqueiros,* 99 Idaho 396, 400, 582 P.2d 1074, 1078 (1978)(citing *Brothers v. Arave,* 67 Idaho 171, 174 P.2d 202 (1946)). Whether a contract exists when contracting parties agree to reduce their agreement to writing, is a question of the parties' intent. *Id. See also, Thompson,* 122 Idaho at 696, 838 P.2d at 299.

Intermountain, 136 Idaho at 237 (emphasis added).

Ultimately, the Court held that because of the undisputed facts regarding L-P's failure to sign the contract, there was no express contract. The Court stated:

> The district judge was correct in inferring from the undisputed facts that the written contract was to be the consummation of the negotiation between the parties and that the signed contract would govern their relationship. Because L-P did not sign the document, and the district judge could reasonably infer L-P did not intend to be bound until the document was signed, the district judge did not err in concluding that the parties lacked mutual assent to be bound.

Intermountain, 136 Idaho at 238.

A review of the undisputed facts reveal that there was never any expressed contract between EVCO and Cedar Street. Rather, there were a series of negotiations preliminary to a written contract and, although the parties looked to enter into a written contract, it was never consummated by either party. EVCO prepared and submitted a number of bid proposals and Cedar Street submitted a blank subcontract, which was never signed by either party. (Ex. F). Similar to *Intermountain,* Cedar Street's owner testified it was always his intent to consummate any agreement with a formal written contract. (Tr. Vol. II, p. 64, l. 2-7; p. 78, l. 22-25). Pursuant to its Proof of Claim to Seaboard, EVCO recognized there was never a "written" contract *per se.* Rather, there was a series of documents, which EVCO argues creates a "written" contract. (Ex. 2).

Although the district court acknowledged the above-referenced factors, it ignored the undisputed evidence. There is no dispute that both Cedar Street and EVCO intended to set forth their agreement by a signed written document to finalize their negotiations. (Tr. Vol. II, p. 12, l. 21 - p. 16, l. 6; p. 20, l. 9-18; p. 42, l. 13 - p. 46, l. 3; p. 78, l. 22-25, p. 109, l. 24 - p. 112, l. 9). Where there is no dispute the parties intended to be bound only by a written agreement, no express contract is formed without the executed written agreement. *See Mitchell v. Siqueiros,* 99 Idaho 396, 400, 582 P.2d 1074, 1078 (1978). Evaluating the factors necessary to determine the intent of the parties

requires the conclusion that it was their mutual intent to enter into a written agreement. As to the first factor (whether the contract is one usually put in writing), the district court agreed that this type of contract usually should be put in writing, but asserted that EVCO often does not get them in writing. Cedar Street, however, does. Moreover, even Mr. Bauer testified he expected to have written contract. (Tr. Vol. II, p. 15, l. 15 - p. 16, l. 6). The district court ignored, however, the great lengths Cedar Street took to prepare a contract and its testimony that it expected a written contract, either a purchase order or subcontract. (Tr. Vol. II, p. 42, l.13 - p. 44, l. 25; p. 45, l. 20 - p. 46, l. 3). Additionally, Cedar Street's contract with Ormond Builders required that any agreement between EVCO and Cedar Street be in writing. (Ex. M). The statute of frauds also requires it. *See* Idaho Code § 28-2-201. The Project specifications also require a written subcontract § 5.3. (Ex. N).

Considering the second factor (whether there are few or many details), the district court incorrectly asserted that all of the details of the agreement were contained in the specifications. (R., p. 247). The specifications do not explain the scope of work to be performed by EVCO or any of the terms set forth by Cedar Street in its proposed subcontract. Based on the details regarding the scope of work and the terms proposed by Cedar Street, the specific details needed to be set forth in a written agreement, but were not.

As to the third factor (whether the amount involved is large or small), the district court provided no opinion. However, a contract for any of the proposed prices ranging from $165,850, $170,161.00 or $132,688.04 in Exhibit 18 is a large amount of money. (Ex. 18). Further, Cedar

Street testified it expected to have a written contract because of the large amount of money and scope of work. (Tr. Vol. II, p.63, l.17 - p.64, l.7).

Regarding the fourth factor (whether it requires a formal writing for a full expression of the covenants and promises), a writing was required to express the full agreement. Cedar Street desired a number of specific terms in its contract so that EVCO was bound to Cedar Street as Cedar Street was bound to Ormond Builders. The district court acknowledged only the price and scope as essential terms, but there is no dispute that Cedar Street wanted EVCO to be bound under the same terms as Cedar Street was bound to Ormond Builders. (Tr. Vol. II, p. 43, l. 17 - p.44, l. 25; Ex. M and Ex. F).

Finally as to the fifth requirement (whether the negotiations indicate that a written draft is contemplated), the negotiations clearly indicated a written draft was to be the final conclusions of negotiations. As argued previously, Cedar Street, on several occasions, informed EVCO it expected a contract. Cedar Street indicated its intent to contract with a written agreement and sent EVCO a proposed subcontract. (Ex. 14 and Ex. F). Even EVCO concedes that it anticipated that a written contract would be the end result. (Tr. Vol. II, p. 20, l.15 - p. 21, l. 2).

Although the district court repeatedly stated that Cedar Street directed EVCO to "start work," Cedar Street only requested that EVCO provide a very limited amount of materials, back cans (no labor was requested), and in the very same document asked that EVCO review the subcontract. Further, the district court found as determinative that "EVCO dictated the prices of the items on their subcontract with Cedar Street, and Cedar Street accepted those in making its bid to Ormond

Builders." (R., p. 247). This Court has previously rejected that a subcontractor's use of another parties' bid is acceptance of an offer. "It is a settled common law principle that utilizing a subcontractor's bid in submitting the prime or general contract bid does not, without more, constitute an acceptance of the subcontractor's offer conditioned upon being awarded the general contract by the awarding authority. *Mitchell v. Siqueiros,* 99 Idaho 396, 399, 582 P.2d 1074, 1077 (1978); *see also C.H. Leavell & Co. v. Grafe & Assoc., Inc.*, 90 Idaho 502, 514, 414 P.2d 873, 879 (1966) ("Mere use of respondent's bid is not tantamount to an acceptance."). Thus, this conclusion is in error and of no relevance.

Based on Cedar Street and EVCO's repeated attempts to reach an agreement, including a review of contract documents, it is clear the parties intended their negotiations to conclude with a written contract. Just like *Intermountain, Mitchell* and *C.H. Leavell,* no expressed contract between EVCO and Cedar Street existed because the required written mutual assent never occurred without an executed written agreement.

Importantly, EVCO was in the unique position that it could have avoided this dispute by insisting upon and obtaining an executed a written subcontract or purchase order as a condition of supplying material or equipment to the Project. EVCO could have insisted on a fully executed joint check agreement. It did not. Seaboard respectfully requests that the case be reversed and remanded.

B. The District Court Erred in Awarding EVCO Expectation Damages.

The issue of damages is directly related to the contract formation issue raised above. In order to award expectation damages as it did, the Court must necessarily find "mutual assent" as to the

scope of work and the price to be paid EVCO. The Restatement (Second) of Contracts at section 344 sets forth the three interests protected in the law of contract (expectation interests, reliance interests, and restitution interests). Expectation damages are predicated upon the existence of an express agreement between parties to a contract and the benefit which the aggrieved party would have enjoyed, absent a breach by the other. Reliance interests, however, put the aggrieved party back into the same position as if no contract had been formed. *See Restatement (Second) of Contracts,* §344(b). Finally, "restitution interests" restore to the aggrieved party the benefit conferred on the breaching party. *Restatement (Second) of Contracts,* §344(c).

As noted above, the district court found mutual assent by way of the ***conduct of the parties*** and thereby inferred an express contract and awarded EVCO its expectation damages. Seaboard submits that, at best, the evidence more appropriately established that Cedar Street and EVCO reached an implied in fact contract. Where an implied in fact contract is established, the recovery must be limited to the reasonable value of the materials and labor provided to the Project. In *R.D. Bischoff v. Quong-Watkins Properties,* 113 Idaho 826, 748 P.2d 410 (1987), the court explained:

> Recovery is based on an implied in fact contract. An implied in fact contract is found where there is no express agreement but the conduct of the parties implies an agreement from which an obligation in contract exists. . . . The measure for recovery on quantum meruit is the reasonable value of the services rendered, not the value of the actual benefit realized and retained. *Peavey v. Pellandini, supra; see generally* D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 4.2 at 237 (1973).

R.D. Bischoff v. Quong-Watkins Properties, 113 Idaho at 829, 748 P.2d at 413.

Assuming an implied in fact contract existed, EVCO's Exhibit 22 sets forth its reliance damages. Mr. Bauer admitted Exhibit 22 included all of the materials and labor tracked on the

Project, a total of $51,108.63. (Tr. Vol. II, p. 25, l. 24 - p. 26, l. 2; p. 27, l. 11-24). Consequently, Cedar Street was paid in excess of its reliance damages. Seaboard submits that the Court should reverse the district court's grant of expectation damages awarded to EVCO. EVCO's recovery, if any should be limited to its implied in fact contract damages, i.e. "reliance damages," set forth in Exhibit 22.

C. EVCO's Notice of Claim and Action Were Untimely under the Idaho Public Contract Bond Act.

The district court erred as a matter of law because EVCO failed to submit its claim and file suit timely. EVCO's action against Seaboard is based solely as a claim against Seaboard's payment bond provided pursuant to the Idaho Public Contract Bond Act (the "Act"), Idaho Code § 54-1925 *et seq.* By its Complaint, EVCO alleged it entered into a ***written subcontract*** with Cedar Street Electric on the Project and is therefore a "claimant" under the Act. (R., p. 3). EVCO acknowledged that it was required to comply with the 90-day notice requirement of § 54-1927, (Attached as Appendix A), (Ex. 2; R., p. 3, Complaint ¶ 12) and the one year suit limitation set forth in the bond.

EVCO provided a Notice of Claim to the General Contractor, Ormond Builders, which was received by Ormond Builders on June 13, 2005. (Ex. 2). Pursuant to EVCO's Notice and EVCO's counsel's correspondence to Seaboard of September 29, 2005 (Ex. 2), EVCO claimed its last work was "training" provided to the Owner on April 15, 2005.[8] The Idaho Public Contracts Bond Act was

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[8] EVCO later alleged its last work occurred in June 15, 2005, when it allegedly delivered "as-built" drawings to *someone* relating to the Project. (Tr. Vol. I, p. 45, l. 4-15). Neither the as-built drawings nor the transmittal of the drawings were introduced into evidence at trial, therefore this argument should not be considered by this Court on appeal. EVCO also alleged some changes to the TV system were made in April of 2005. Seaboard assumes for the purposes of its

enacted to protect suppliers and subcontractors providing labor and materials to public works projects. This purpose was discussed in detail in *LeGrand Steel Products Co. v. A.S.C. Constructors, Inc.*, 108 Idaho 817, 702 P.2d 817 (Ct. App. 1985), where the Court stated:

> Idaho Code § 54-1925 *et seq.*, the "Public Contracts Bond Act," is substantially similar to 40 U.S.C. § 270a *et seq.*, commonly known as the Miller Act. Both the federal and state statutes were enacted to protect persons who furnish labor or materials to public works projects. The statutes serve a remedial purpose. Normally, in private construction projects, those who furnish labor and materials without receiving payment may file and foreclose mechanics' liens. However, because such liens cannot be asserted against public property, the payment bond is required by statute.
>
> The scope of statutory protection is limited to two categories of potential claimants. First, those who have a direct contractual relationship with the prime contractor may recover against the payment bond. Second, those who have a direct contractual relationship with one of the prime contractor's "subcontractors" also may recover. *See* I.C. § 54-1927 and 40 U.S. § 270 b;

LeGrand Steel, 108 Idaho at 818.

Both the Idaho Lien statute I.C. § 45-501 and the Act at I.C. §54-1927, provide relief to subcontractors and suppliers for labor and materials incorporated into an improvement. The Lien statute allows a lien for claimants "performing labor upon, or furnishing materials to be used in the construction . . ." Likewise the Act provides that a claimant "who has furnished labor or material . . . in the prosecution of the work . . ." has a claim against the payment bond. Thus, the question before the court is whether EVCO's claimed actions in training school district personnel on systems,

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argument, that these allegations may be considered true, i.e., EVCO trained people on April 15, 2005, and fine-tuned the TV system in April 2005. Seaboard submits these actions do not constitute furnishing "labor or materials . . . in the prosecution of the work" sufficient to extend the deadline to provide notice of a proper bond claim or bring an action on the bond.

fine-tuning the TV system or allegedly providing "as-built" drawings[9] constitute "labor or materials" for which it could assert a claim against the bond. Seaboard respectfully submits they are not.

Perhaps the most compelling testimony regarding the status of the work on the Project came from the Project Architect, Scott Fisher. Mr. Fisher testified that he or his staff reviewed the progress of the construction to certify the percentage of completion on a monthly basis. Mr. Fisher's testimony is found at pages 226 through 236 of Volume II of the Transcript regarding the completion of the Project and regarding Exhibit Q, which are the final pay applications. The School District took possession of the Project on January 28, 2005, at which time all of the electrical systems, including those for which EVCO supplied material and some labor, were completed and functional. Reviewing Mr. Fisher's testimony, and **Pay Application No. 11**, Ex. Q, dated February 17, 2005, Mr. Fisher certified all of the electrical systems as ***100% complete as of March 1, 2005.*** (Tr. Vol. II, p. 230, l. 17 - p. 231, l. 22; Ex. Q). Certainly there was punchlist and warranty work, as well as landscaping work to be completed, however, all of the electrical "work" was completed. Seaboard respectfully submits EVCO's claim to have performed "work" after March 1, 2005, amounted to no more than punch-list, warranty or incidental work, which would not extend the date to file a Notice of Claim or file suit on the bond.

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[9] As-built drawings are defined as follows: "Record drawings made during construction. As-built drawings record the locations, sizes and nature of concealed items such as structural elements, accessories, equipment, devices, plumbing lines, valves, mechanical equipment, and the like. These records (with dimensions) for a permanent record for future reference." R. S. Means, *Means Illustrated Construction Dictionary,* 3rd ed., 2000.

Although there are few Idaho cases construing the Public Contracts Bond Act notice and bar date provisions, the Idaho Supreme Court has held that consideration of federal decisions under the Miller Act is appropriate when construing the Idaho Public Contracts Bond Act. *See Beco Corp. v. Roberts & Sons Const. Co., Inc.*, 114 Idaho 704, 712, 760 P.2d 1120, 1128 (1988). The many Miller Act decisions addressing this issue conclude that punch-list or warranty work do not extend those dates and the conclusion that work was performed pursuant to a contractual obligation is not determinative as to whether such work qualifies to extend the notice and bar dates. *See also General Electric Co. v. Webco Const. Co.*, 164 Colo. 232, 239, 433 P.2d 760, 763 (Colo. 1967) (miscellaneous work such as touch-up painting and patching after substantial completion of school not sufficient to extend bar date to bring suit on bond); *U.S. ex rel PRN Associates, Inc. v. K & S Enterprises, Inc.*, 2007 WL 925267 (S.D. Ind. Mar. 27, 2007).

In *U.S.A. ex. rel. Interstate Mechanical Contractors, Inc. v. International Fidelity Insurance Co.*, 200 F.3d 456 (6th Cir. 2000), the Sixth Circuit Court of Appeals dealt with a timeliness issue similar to that presently before this Court. In *International Fidelity,* the Sixth Circuit determined the issue of when the one-year statute of limitations commenced under the Miller Act. The contractor completed its work in early June 1994 and the government took occupancy of the project on June 17, 1994. Thereafter, a subcontractor of the plaintiff, returned to the Project to conduct testing and the subcontractor ultimately replaced several pieces of equipment. The replaced equipment was then retested on October 18, 1994. Exactly one year after the last testing of the replaced equipment, the plaintiff filed suit, on October 18, 1995. *International Fidelity,* 200 F.3d

at 458. The Sixth Circuit answered the question of "when the last labor was performed or material supplied" for purposes of the commencement of the statute of limitations holding that the initial date of substantial completion as the operative date. The *International Fidelity* court stated:

> We agree with the majority of courts that have interpreted the phrase and have concluded it connotes more than mere substantial completion or substantial performance of the plaintiff's obligations under its contract. *See United States ex rel. Austin v. Western Elec. Co.*, 337 F.2d 568, 572 (9th Cir.1964). Furthermore, we agree that work done at the request of the government and pursuant to a warranty, subsequent to final inspection and acceptance of the project, falls outside the meaning of labor performed as set forth in § 270b(b). If post-completion work performed pursuant to a warranty could toll the Miller Act's statute of limitations, then the surety would have no repose until all such warranties expired. . . .
> ***The majority of circuits that have addressed this issue have held that remedial or corrective work or materials, or inspection of work already completed, falls outside the meaning of "labor" or "materials" under § 270b(b). Hence, performing such work or supplying such materials will not toll the Miller Act's one-year statute of limitations.*** *See, e.g., United States for the use of Billows Elec. Supply Co. v. E.J.T. Constr. Co., Inc.*, 517 F.Supp. 1178, 1181 (E.D. Pa.1981), *aff'd.* 688 F.2d 827 (3d Cir.), *cert. denied*, 459 U.S. 856, 103 S.Ct. 126, 74 L.Ed.2d 109 (1982); *United States for the use of Magna Masonry, Inc., v. R.T. Woodfield, Inc.*, 709 F.2d 249, 250 (4th Cir.1983); *United States ex rel. Austin v. Western Elec. Co.*, 337 F.2d 568, 572 (9th Cir.1964); *United States for the use of State Elec. Supply Co. v. Hesselden Constr. Co.*, 404 F.2d 774, 776 (10th Cir.1968). ***The majority rule requires the trier of fact to distinguish "whether the work was performed ... as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project.' "*** *Austin*, 337 F.2d at 572-73 (quoting *United States ex rel. Gen. Elec. Co. v. Gunnar I. Johnson & Son, Inc.*, 310 F.2d 899, 903 (8th Cir.1962)).

International Fidelity, 200 F.3d at 459-60 (emphasis added).

The court then addressed the identical argument asserted by EVCO in this case. Namely, that its "contractual obligations" which might require additional work beyond the date of substantial

completion should extend the notice and bar dates. In rejecting the argument as made by EVCO and adopted by the district court at Conclusions of Law ¶ 3 - 5, the court in *International Fidelity* stated:

> A contractor's duties under a contract may extend, by virtue of warranty or other obligation, to a point in time far beyond that date when the project has been completed and the "last of the labor was performed or material was supplied" for purposes of the Miller Act. Interstate's argument would have this Court interpret the Miller Act to equate the term "labor" to the term "contractual duties." As a result, the statute of limitations period would commence only after the end of the warranty period, perhaps many years after the project's completion. To interpret the Miller Act as Interstate suggests would frustrate the policy of repose that the limitations period serves, and we find no support for such a construction in the Miller Act's text, legislative history, or in the applicable case law. We thus reject Interstate's proposed construction as contrary to the Act's language and underlying policy.

International Fidelity, 200 F.3d at 461.

The evidence at trial established, and it is undisputed, that the School District took possession of the Project on January 28, 2005, and began holding class from that date forward. All of the low-level electrical systems were tested, inspected, training conducted and were operational as of that date. EVCO's actions in performing additional training, fine-tuning the TV system[10] or providing as-built drawings should not be considered "labor or materials . . . in the prosecution of the work" under I.C. §54-1927, for the same reasons cited in *International Fidelity*, 200 F.3d 456 (6th Cir. 2000). EVCO's Notice of Claim, dated June 8, 2005, was untimely, as was the commencement of this action on March 10, 2006.

As noted above, the Idaho Public Bonds Act was enacted to serve the same purpose as the Idaho Mechanics and Materialmans Lien provisions only in the context of public works. Idaho

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[10] The district court found that EVCO "installed" the TV system on April 15, 2005, but the testimony regarding the TV system was that it was installed and working, but was balanced in April for optimal performance. (Tr. Vol. II, p. 38, l. 8-21).

Courts may draw from the lien statute in construing the Bond Act. *See LeGrand Steel Products,* 108 Idaho at 819; 702 P.2d at 857. Certainly, it is well settled law in Idaho that substantial completion is a construction milestone, which properly commences the time deadline to record a mechanics lien against a private works project. This proposition was announced as early as the Idaho Supreme Court's decision in *H.W. Johns-Mannville Co. v. Allen,* 37 Idaho 153, 215 P. 840 (1923), and was clearly articulated in *Mitchell v. Flandro,* 95 Idaho 228, 506 P.2d 455 (1972). In *Mitchell*, the plaintiff constructed an auto dealership for the defendant, Flandro, and the architect signed a certificate of substantial completion dated November 10, 1964. However, the plaintiff contractor continued work through January 2, 1965, and recorded its lien on March 11, 1965. Ultimately, the trial court determined the lien was untimely based upon the substantial completion date. This court upheld the decision stating:

> ***It is established that 'trivial' work done or materials furnished after the contract has been substantially completed will not extend the time in which a lien claim*** can be filed under I.C. 45-507. As well articulated in *Gem State Lumber Co. v. Whitty,* 37 Idaho 489, 217 p. 1027:
>
> 'While the time fixed in the contract for the completion of a building is not controlling against laborers or materialmen, it has a direct bearing upon the time when the building was to be completed under the contract, so that the time for filing liens for material and labor would begin to run. The statute provides that this time shall be computed from the date of the last item of material furnished, or from the last work performed. The rule very generally, prevails that such time begins to run from a substantial completion of the contract, and that new items thereafter added to the account will not extend the time in which to claim a lien or revive a lien already expired. The more difficult question is to determine when under this doctrine the contract has been completed. By the weight of authority, this is to be ascertained by the conditions of the contract, the conduct of the parties with reference thereto, and the surrounding facts and circumstances. (Citations omitted).

> 'Ordinarily, furnishing an article or performing a service trivial in character is not sufficient to extend the time for claiming a lien or to revive an expired lien, where the article is furnished or the service rendered after a substantial completion of the contract, and the article is not expressly required by the terms thereof.' *Gem State Lbr. Co. v. Whitty, supra, at 499, 217 P. at 1030.*(Emphasis added).
>
> Since it is undisputed that the contract was substantially completed on November 10, 1964, and since the trial court found inadequate proof that any material or substantial work was performed or supplies furnished after that date which would extend the time for filing a lien, we conclude that the trial court was correct in ruling that the lien was not timely filed. *H. W. Johns-Manville Co. v. Allen,* 37 Idaho 153, 215 P. 840 (1923).

Mitchell, 95 Idaho at 231-32; 506 P.2d at 458-59 (emphasis added).

With respect to the Project at hand, it is undisputed that the architect certified all of the low-voltage systems on which EVCO provided material and some labor, as 100% complete as of March 1, 2005. (Ex. Q). The School District began utilizing the building as a functioning school as of January 28, 2005. EVCO's actions in training of School District personnel, fine-tuning of the TV systems, or providing as-built drawings should not extend the deadline for EVCO's 90-day notice under the Act, or the limitation on which it was required to bring suit.

Noteworthy, is Mr. Bauer's testimony, that EVCO bills or invoices for its work only after it has completed the work identified in the invoice. Stated otherwise, EVCO's invoices reflect labor or materials supplied as of the date of the invoice. (Tr. Vol. II, p. 24, l. 3-22). In its Proof of Claim to Seaboard, EVCO certified its claim and supporting documentation under penalty of perjury. (Ex. 2). Therein, EVCO submitted its billing invoices as attachment b, and its "Final Billing on Project", invoice No. 6710 was dated February 11, 2005. Because there is no dispute that it was EVCO's practice to bill for work only after it had been completed, and no evidence was presented regarding

this invoice to conflict with this conclusion, it must be inferred that the work reflected in this invoice had already been completed by that date. If EVCO's last true work on the Project was completed on or before Invoice No. 6710 dated February 11, 2005, then its Notice was mailed 117 days after its last labor and materials and received 122 days thereafter, i.e. untimely. The only way to save its claim from a challenge as to timeliness was to submit a "revised" final bill with a different date that would render the claim timely. In order to change the last day of work, so as to render the notice and filing of suit timely, EVCO resubmitted this invoice at trial as Exhibit 20 with a new date March 22, 2005. Review of the invoice clearly demonstrates that the work was completed prior to the February 11, 2005, date and that the claim was therefore untimely. Seaboard submits EVCO's sworn proof of claim and "Final Billing" invoice dated February 11, 2005, prove its notice and claim were untimely.

D. The Idaho Statute of Frauds Bars EVCO's Claim Against Seaboard.

The district court ignored the plain language of Idaho Code § 28-2-201 in holding that EVCO's claim was not barred by the statute of frauds. As noted in Seaboard's Motion for Involuntary Dismissal, the Idaho Statute of Frauds, Idaho Code § 28-2-201, requires any contract for the purchase and sale of goods in excess of $500.00 to be in writing and signed by the party against whom the enforcement is sought (i.e., Cedar Street). (R., p. 268). Moreover, the Project specifications required such contracts to be in writing. (Ex. N, p. 23). In its conclusions of law, however, the district court held the exception set forth at § 28-2-201(2) took the transaction out of the statute of frauds because there was no written objection by Cedar Street and both parties were

"merchants." Additionally, the district court held that § 28-2-201(3)(c) took the matter outside of the statute of frauds, because payment had been received. Seaboard contends the district court's conclusions of law were erroneous.

1. The Exception 28-2-201(2) Does Not Apply to Seaboard.

The Statute of Frauds code exception found at subsection (2) states:

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) ***against such party*** unless written notice of objection to its contents is given within ten (10) days after it is received.

Idaho Statute of Frauds § 28-2-201(2). Although Seaboard could not find relevant case law interpreting this language, it is likely because the plain text is clear and simple to apply. The exception does not apply as against a third party – Seaboard.

In this matter, at least as to its case against Seaboard, EVCO is attempting to assert claimed contract entitlement against Seaboard's bond. The exception at 28-2-201(2) appears to only relate to Cedar Street, a party to the proposed transaction. Perhaps it could be argued the exception applies as to claims against Cedar Street, but that issue is irrelevant. Seaboard should be entitled to the protections of Idaho Code § 28-2-201(1) based on its clear and unambiguous meaning. Official comment No. 3, supports Seaboard's construction.

2. The I.C. § 28-2-201(3)(c) Exception for Payment.

With respect to the exceptions set forth at § 28-2-201(3)(c), EVCO's alleged contract was taken out of the statute of frauds because it has been paid for its performance. If such is the case,

then its claims against Seaboard fails, because it has been paid for its performance. As with the previous exception, such may be valid as against a statute of frauds defense asserted by Cedar Street, but not Seaboard.

V. CONCLUSION

Based on the foregoing, Seaboard respectfully requests that the case be reversed and remanded for an Order to be entered setting forth that EVCO's notice and claim are untimely, no express contract was formed between EVCO and Cedar Street, and EVCO has already been paid its reliance measure of damages.

RESPECTFULLY SUBMITTED this 11th day of August, 2008.

Frederick J. Hahn, III
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
Appellant Seaboard Surety Company

DeAnne Casperson
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
Appellant Seaboard Surety Company

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 11th day of August, 2008.

DOCUMENT SERVED: APPELLANT'S BRIEF

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Appendix A

54-1927. Claims for labor or material furnished or equipment supplied — Suit on contractor's payment bond — Procedure — Limitation. — Every claimant who has furnished labor or material or rented, leased, or otherwise supplied equipment in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under this act, and who has not been paid in full therefor before the expiration of a period of ninety (90) days after the day on which the last of the labor was done or performed by him or material or equipment was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final judgment for the sum or sums justly due him and have execution thereon; provided, however, that any such claimant having a direct contractual relationship with a subcontractor of the contractor furnishing such payment bond but no contractual relationship expressed or implied with such contractor shall not have a right of action upon such payment bond unless he has given written notice to such contractor within ninety (90) days from the date on which such claimant performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the person to whom the material or equipment was furnished or supplied or for whom the labor was done or performed. Each notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or at his residence.

The contracting body and the agent in charge of its office, is authorized and directed to furnish, to anyone making application therefor who submits an affidavit that he has supplied labor, equipment, or materials for such work and payment therefor has not been made or that he is being sued on any such bond, or that it is the surety thereon, a certified copy of such bond and the contract for which it was given, which copy shall be prima-facie evidence of the contents, execution, and delivery of the original. Applicants shall pay for such certified copies such reasonable fees as the contracting body or the agent in charge of its office fixes to cover the actual cost of the preparation thereof.

Every suit instituted on the aforesaid payment bond shall be brought in appropriate court in any county in which the contract was to be performed and not elsewhere; provided, however, that no such suit shall be commenced after the expiration of one (1) year from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material or equipment for which such suit is brought, except, that if the claimant is a subcontractor of the contractor, no such suit shall be commenced after the expiration of one (1) year from the date on which final payment under the subcontract became due. [1965, ch. 28, § 3, p. 43; am. 1980, ch. 199, § 2, p. 460.]